Federal Court  Cour fédérale

Date: 20110202

Docket: IMM-5074-09

Citation: 2011 FC 121

Ottawa, Ontario, February 2, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

LEANNE MICHELLE DOBSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Leanne Michelle Dobson (the "Applicant") seeks judicial review of the decision made by Mr. Erwin Nest, Member of the Immigration and Refugee Board, Immigration Appeal Division (the "IAD"). In that decision, dated September 23, 2009, the IAD dismissed the Applicant's appeal from a visa officer's decision, refusing the permanent resident visa application of her husband, Mr. Sherif Rashidy Ali.

Background

[2] The Applicant is a Canadian citizen, living in Edmonton, Alberta. She is employed with the Federal Public Service and is financially independent. Mr. Ali is a 40 year old citizen of Egypt, currently residing in that country.

[3] Before meeting the Applicant, Mr. Ali had been married twice and had also engaged in a common law relationship with a third woman. During his first marriage, which occurred in Egypt, Mr. Ali fathered one child. His second marriage took place after he arrived in the United States, apparently for the purpose of obtaining status in the United States. This marriage did not produce any children, since the woman was significantly older than Mr. Ali and is now deceased.

[4] Mr. Ali subsequently entered into a common law marriage with a woman with whom he had three children. Even while this relationship was ongoing, Mr. Ali fathered another child with his first wife, even though that marriage had ended in divorce some years earlier.

[5] The Applicant and Mr. Ali first met at La Guardia airport in New York in September 2006 and soon began a romantic relationship. She made three visits to New York between September 2006 and January 2007. Mr. Ali attempted to visit the Applicant in Canada but his January 2007 application for a temporary resident's visa was refused.

[6] The Applicant and Mr. Ali married on March 15, 2007 in New York. It was a small wedding. Subsequently, Mr. Ali applied for permanent residence status in Canada under the family

class, under the sponsorship of the Applicant. The application was received by Citizenship and Immigration Canada on June 27, 2007.

[7] Mr. Ali's application for permanent residence was denied on January 29, 2008, on the basis that his marriage to the Applicant was not genuine. The Applicant submitted a Notice of Appeal – Sponsorship Appeal to the IAD on March 10, 2008.

[8] The Applicant visited Mr. Ali in New York seven times between their marriage in March 2007 and August 2008. The Applicant and Mr. Ali also maintained regular contact by letters, emails, Skype and telephone during that time.

[9] The Applicant had a child with Mr. Ali, a daughter who was born on October 1, 2008 in Edmonton, Alberta. At the time of the child's birth, Mr. Ali was living in Egypt.

[10] The IAD hearing was held over 4 days through May, July and August, 2009. The Applicant testified in person, and Mr. Ali provided evidence via telephone from Egypt.

[11] The Applicant travelled to Egypt in August 2009 with her child. During that visit, the Applicant met the members of her husband's family including his parents and some of his siblings. Mr. Ali testified before the IAD that the couple also had plans to visit Mr. Ali's children in another part of Egypt during the Applicant's trip.

The IAD's Decision

[12] On September 23, 2009 the IAD rejected the Applicant's appeal, on the grounds that Mr. Ali was not a member of the family class because the marriage of the Applicant and Mr. Ali was not genuine, pursuant to the provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations").

[13] In its decision, the IAD referred to evidence of ongoing contact and visits between the Applicant and Mr. Ali, and the details of Mr. Ali's past relationships and attempts to immigrate to the United States. The IAD also considered the couple's decision to have a child, the Applicant's knowledge of Mr. Ali's past, and their future plans. Finally, the IAD noted the religious differences of Mr. Ali and the Applicant, and that Mr. Ali has a great deal to gain from becoming a permanent residence of Canada by marrying the Applicant.

Discussion and Disposition

[14] The Applicant argues that the IAD applied the wrong legal test and erred in a number of findings of fact. In my opinion, this application for judicial review can be disposed of on the basis of the second issue raised by the Applicant.

[15] I will first address the applicable standard of review. In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para. 53, the Supreme Court of Canada held that findings of fact are reviewed on the standard of reasonableness:

> Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Mossop*, at pp. 599-600; *Dr. Q*, at para.

> 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

[16] In my opinion, the IAD made a number of factual findings in this case that are unreasonable, as they lack justification and intelligibility.

[17] The IAD found that the Applicant and Mr. Ali had not addressed their religious incompatibility, which the IAD considered to be an indication that their marriage is one of convenience. In my opinion, based on the Record, this finding is unreasonable.

[18] The Applicant attends a United Church two or three times a year, while Mr. Ali is a non-practising Muslim. The Applicant testified to the IAD that she is open to converting to Islam, but that Mr. Ali had not asked her to convert. On this basis, it is not apparent that the beliefs and practices of Mr. Ali and the Applicant are incompatible, or that they would require a plan to mitigate their differences.

[19] The Applicant also testified to the IAD that she and Mr. Ali intended to expose their child to both the Christian and Muslin faiths, and allow her to decide, in the future, the belief system of her choice. In my opinion, this is directly contrary to the IAD's finding that Mr. Ali and the Applicant had not addressed their religious differences, and is a further indication that the IAD's finding in that regard is unreasonable.

[20] At paragraph 37 of its decision, the IAD found that the Applicant made an "admission that she has never asked [Mr. Ali] about the reasons he fathered another child with his first wife", and on

that basis, concluded that it was unreasonable for the Applicant not to have made more pressing inquiries into Mr. Ali's past.

[21] The Applicant stated to the IAD that she and Mr. Ali had discussed such matters, including why Mr. Ali conceived an additional child with his first wife, and that she remembered the conversation specifically. This evidence runs directly contrary to the IAD's conclusion. In drawing its conclusion without reference to that evidence, the IAD acted unreasonably.

[22] Finally, the IAD found that the Applicant and Mr. Ali had not discussed their future plans, and that the Applicant had not taken sufficient steps to integrate Mr. Ali into her life.

[23] The finding that the couple had not discussed their future is contrary to the Applicant's testimony to the IAD that they had discussed their future together many times. The IAD does not discuss this evidence. The IAD does not indicate what steps the Applicant could or ought to have taken to integrate Mr. Ali into her life in Canada.

[24] The Applicant named Mr. Ali as a beneficiary in her will. She invested in his limousine business in the United States. The couple opened a joint bank account, and the Applicant listed Mr. Ali as an insured on her home and automobile plans. Given their circumstances, particularly Mr. Ali's lack of status in Canada, it is not clear how the Applicant would have further integrated Mr. Ali into her daily life. In my opinion, these findings are unreasonable.

[25] The Applicant points to a number of other findings of fact made by the IAD that she impugns as unreasonable. In my opinion, based on the number of unreasonable findings discussed above, it is not necessary to address those other findings.

[26] This application for judicial review is allowed and the matter is remitted to a differently constituted panel of the IAD. The Applicant proposed the following question for certification:

> Is the Immigration Appeal Division of the Immigration and Refugee Board bound in law to apply the principle that, in a sponsorship of a spouse, absent exceptional circumstances to prove otherwise, a reasonable person accepts a child of the marriage as proof of a genuine spousal relationship?

[27] Having regard to the test for certifying a question stated by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v. Zazai* (2004), 247 F.T.R. 320, I am not satisfied that the proposed question is one of general importance that transcends the facts of this particular case, and no question will be certified.

ORDER

THIS COURT ORDERS that this application for judicial review is allowed and is remitted to a differently constituted panel of the IAD, no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5074-09
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